

Message Text

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TAGS: EFIN, OECD

SUBJECT: DRAFT LANGUAGE FOR NATIONAL TREATMENT PRINCIPLE

REF: A. OECD PARIS 1236; B. DOCUMENT CES/73.117

1. AT SECOND AD HOC MEETING OF EXPERTS ON INTERNATIONAL INVESTMENT ON JANUARY 10-11, 1974 US PROMISED TO PROVIDE TO SECRETARIAT SAMPLE LANGUAGE FROM FCN TREATY WITH RESPECT TO DEFINITION OF NATIONAL TREATMENT AND SCOPE OF COVERAGE. (ESSENTIALLY TO SUBSTITUTE FOR DEFINITION UNDER PARAGRAPH 12A OF REF B) YOU MAY GIVE SECRETARIAT LANGUAGE IN PARAGRAPHS 2 AND 3 BELOW. WE HAVE ALSO INCLUDED A DEFINITION OF LIMITED OFFICIAL USE

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"COMPANIES" IN PARAGRAPH 4 WHICH THE SECRETARIAT MAY FIND

USEFUL. THIS LANGUAGE IS TAKEN LARGELY FROM OUR MODEL FCN TREATY AND IS USED WITH SOME MINOR MODIFICATIONS IN ALL RECENT FCN TREATIES. WE HAVE CHANGED TEXT TO REPLACE REFERENCES TO "PARTIES" WITH REFERENCES TO MEMBER "COUNTRIES"

2. DEFINITION OF NATIONAL TREATMENT: THE TERM "NATIONAL TREATMENT" MEANS TREATMENT (WHETHER BASED ON THE LEGAL

REGIME UNDER WHICH BUSINESS ACTIVITIES ARE ORGANIZED AND OPERATED OR THE DE FACTO REGIME RESULTING FROM ADMINISTRATIVE DECISIONS OR POLICIES, WHETHER WRITTEN OR UNWRITTEN, RELATING TO SUCH ACTIVITIES) ACCORDED WITHIN THE TERRITORIES OF A MEMBER COUNTRY UPON TERMS NO LESS FAVORABLE THAN THE TREATMENT ACCORDED THEREIN, IN LIKE SITUATIONS, TO NATIONALS, COMPANIES, PRODUCTS, VESSELS OR OTHER OBJECTS, AS THE CASE MAY BE, OF SUCH MEMBER COUNTRY.

3. SCOPE OF NATIONAL TREATMENT: NATIONAL TREATMENT GENERALLY ENCOMPASSES ALL DIRECT AND INDIRECT BUSINESS ACTIVITIES RELATING TO THE ESTABLISHMENT, OWNERSHIP, OPERATIONS, AND TERMINATION OF THE BUSINESS ENTERPRISES OF NATIONALS AND JURIDICAL ENTITIES OF OTHER MEMBER COUNTRIES. NATIONAL TREATMENT INCLUDES, BUT IS NOT LIMITED TO, THE FORMATION OF COMPANIES AND OTHER ENTERPRISES APPROPRIATE TO THE CONDUCT OF BUSINESS, THE ACQUISITION OF MAJORITY OR OTHER INTERESTS IN JURIDICAL ENTITIES AND THE CONTROL AND MANAGEMENT OF ENTERPRISES ESTABLISHED OR ACQUIRED. IT ALSO EXTENDS TO ACCESS TO JUDICIAL PROCESSES, THE ACQUISITION AND DISPOSITION OF PROPERTY, AND THE PATENT, TAX, EXCHANGE CONTROL, AND CUSTOMS FIELDS.

4. DEFINITION OF "COMPANIES": THE TERM "COMPANIES" MEANS CORPORATIONS, PARTNERSHIPS, COMPANIES AND OTHER ASSOCIATIONS, WHETHER OR NOT WITH LIMITED LIABILITY AND WHETHER OR NOT FOR PECUNIARY PROFIT. COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF A MEMBER COUNTRY SHALL BE DEEMED COMPANIES THEREOF FOR THE PURPOSE OF HAVING THEIR JURIDICAL STATUS RECOGNIZED WITHIN THE TERRITORIES OF OTHER MEMBER COUNTRIES. LIMITED OFFICIAL USE

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5. IN SUBMITTING THE LANGUAGE IN 2, 3, AND 4 YOU SHOULD EMPHASIZE THAT WE ARE PROVIDING THE EXAMPLE TEXTS DRAWN LARGELY FROM OUR FCN TREATIES TO THE SECRETARIAT AS PROMISED BY THE US EXPERTS. THERE SHOULD BE NO IMPLICATIONS THAT THIS LANGUAGE NECESSARILY REPRESENTS WHAT U.S. WOULD FORMALLY ACCEPT IN THE OECD UNDERSTANDING ON NATIONAL TREATMENT. ALSO YOU SHOULD NOTE THAT IN ALL

OF OUR FCN TREATIES WE DO LIST EXCEPTIONS TO THE BROAD COMMITMENTS GIVEN IN 2 AND 3.

6. YOU WILLNOTE THAT PARAGRAPH 3 INCLUDES ESTABLISHMENT, ORGANIZATION, TAKEOVERS, AND CONTROL, AREAS WHICH ARE COVERED IN OUR FCN TREATIES BUT WHICH THE SECRETARIAT AND SOME MEMBER COUNTRIES MAY FEEL SHOULD NOT BE COVERED BY AN OECD UNDERSTANDING ON NATIONAL TREATMENT. WHILE WE WOULD PREFER INCLUDING THESE AREAS IN A NATIONAL TREATMENT UNDERSTANDING, WE WOULD NOT WANT THE WHOLE EFFORT IN OECD TO DRAFT A NATIONAL TREATMENT PRINCIPLE TO FOUNDER ON OUR INSISTENCE ON THIS POINT. ALSO WE BELIEVE THE EXPERTS SHOULD SET THIS QUESTION ASIDE UNTIL THE INVISIBLES COMMITTEE REVIEWS THE OECD LEGAL SERVICES PAPER ON THE COVERAGE OF THE RIGHT OF ESTABLISHMENT BY THE CMC. THUS WE PLAN TO DEFER FOR THE TIME BEING TAKING A FIRM POSITION ON WHETHER ALL THE RIGHTS LISTED IN PARAGRAPH 3 SHOULD BE INCLUDED IN THE NATIONAL TREATMENT UNDERSTANDING.

6. THE PRELIMINARY DRAFT LIST OF EXCEPTIONS TO A NATIONAL TREATMENT UNDERSTANDING, WHICH ALSO WAS REQUESTED BY THE SECRETARIAT, WILL BE CARRIED BY KORP AND WITHERELL TO THE EXPERTS MEETING AND WILL BE MADE AVAILABLE TO THE SECRETARIAT AT THAT TIME. RUSH

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